

3-1-2016

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## Recommended Citation

Chidiebere T. Madu, *Killer Cartoons: Islamophobia, Depictions of the Prophet Muhammad, and the Possible Limitations of Free Speech*, 14 FIRST AMEND. L. REV. 489 (2018).

Available at: <http://scholarship.law.unc.edu/falr/vol14/iss3/6>

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# KILLER CARTOONS: ISLAMOPHOBIA, DEPICTIONS OF THE PROPHET MUHAMMAD, AND THE POSSIBLE LIMITATIONS OF FREE SPEECH

CHIDIEBERE T. MADU\*

## I. INTRODUCTION

On May 3, 2015, the Curtis Curwell Center of Garland, Texas was attacked by two heavily armed American-Muslim extremists.<sup>1</sup> Armed with assault rifles, bulletproof body armor, and hundreds of rounds of ammunition, the gunmen shot and wounded a security guard.<sup>2</sup> Before the gunmen could attack other civilians, they were both killed on the scene in a vicious gunfight with local police.<sup>3</sup> Their attack of the Curtis Curwell Center was motivated by the "Draw Muhammad" Contest, which awarded \$10,000 to the contestant who draws the "best caricature of the Prophet Muhammad."<sup>4</sup> In the Muslim faith, idol worship is strictly forbidden, thus the depiction of the Prophet Muhammad is seen as exceedingly blasphemous and offensive.<sup>5</sup> Following the attack, the Islamic State of Iraq and the Levant

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<sup>1</sup> Liam Stack, *Texas Police Kill Gunmen at Exhibit Featuring Cartoons of Muhammad*, N.Y. TIMES (May 3, 2015), [http://www.nytimes.com/2015/05/04/us/gunmen-killed-after-firing-on-anti-islam-groups-event.html?\\_r=0](http://www.nytimes.com/2015/05/04/us/gunmen-killed-after-firing-on-anti-islam-groups-event.html?_r=0).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> While the *Koran* itself is silent on the issue of visual representation of people, Islamic supplemental teachings, or hadiths, prohibit any visual depiction of Muhammad or any other prophet. See generally SAHIH AL-BUKHARI, HADITH: 7.834, 7.838, 7.840; see also Daniel Burke, *Why Images of Mohammad Offend Muslims*, CNN (May 4, 2015), <http://www.cnn.com/2015/05/04/living/islam-prophet-images/>.

("ISIL") extolled the gunmen's actions and later claimed responsibility.<sup>6</sup>

The "Draw Muhammad" Contest was sponsored and organized by the anti-Islam group, American Freedom Defense Initiative ("AFDI"), led by former journalist Pamela Geller.<sup>7</sup> Given AFDI's history and message,<sup>8</sup> the art exhibit was likely intended to disparage Islam through exercising freedom of speech.<sup>9</sup> Additionally, the art exhibit itself was a response to the recent attack on the French satirical news magazine, *Charlie Hebdo*, which left 12 dead and 11 wounded only four months earlier in France.<sup>10</sup> The art exhibit is one of many examples of the pervasive cycle of violence resulting from Islamophobia in Western societies.

This Note explores what options the government and citizens have, if any, to regulate Islamophobic hate speech—particularly depictions of the Prophet Muhammad—while still respecting the First Amendment of the Constitution. Part II provides a brief summation of the recent history of Islamophobia and explores violent responses to satirical depictions of the Prophet Muhammad that have taken place around the world. Part III examines the First Amendment case law regarding unprotected and hateful speech and applies the existing rules to the Curtis Curwell Center shooting. Part IV presents a

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<sup>6</sup> Julie Watson, *Doubts Raised About Islamic State Claim in Texas Attack*, DETROIT NEWS (May 5, 2015), <http://www.detroitnews.com/story/news/nation/2015/05/05/prophet-cartoon-contest-shooting/26910391/>.

<sup>7</sup> Stack, *supra* note 1.

<sup>8</sup> See generally ATLAS SHRUGS, [www.pamelageller.com](http://www.pamelageller.com) (last visited Mar. 3, 2016).

<sup>9</sup> See *Active Anti-Muslim Groups*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/intelligence-report/2015/active-anti-muslim-groups>; see also ATLAS SHRUGS, [www.pamelageller.com](http://www.pamelageller.com) (last visited Mar. 3, 2016).

<sup>10</sup> Jon Herskovitz & David Schwartz, *Gunman in Mohammad Cartoon Attack in Texas Monitored for Years*, THOMPSON REUTERS (May 5, 2015), <http://in.reuters.com/article/usa-shooting-texas-idINKBN0NP02Z20150505>; see also Adam Withnall & John Lichfield, *Charlie Hebdo Shooting: At Least 12 Killed as Shots Fired at Satirical Magazine's Paris Office*, INDEPENDENT (Jan. 7, 2015), <http://www.independent.co.uk/news/world/europe/charlie-hebdo-shooting-10-killed-as-shots-fired-at-satirical-magazine-headquarters-according-to-9962337.html>.

three-part solution for regulating and limiting Islamophobic speech: (1) through the regulation of forums; (2) a national security advocacy test modified from *Brandenburg v. Ohio*;<sup>11</sup> and (3) the revival of the Heckler's Veto from *Feiner v. New York*.<sup>12</sup> Next, Part V presents the prevailing counterarguments to the solutions proposed in Part IV. Finally, this Note closes with Part VI, which summarizes the Note and explains why steps should be taken, either privately or by the government, to curtail the prevalence of Islamophobic rhetoric.

## II. ISLAMOPHOBIA EXPLAINED AND THE HISTORY OF RETALIATORY ATTACKS

Islamophobia is typically defined as "the fear, hatred, and hostility toward Muslims and Islam,"<sup>13</sup> and the "closed-minded prejudice" toward the religion and its followers.<sup>14</sup> In other words, Islamophobia encompasses the religious hatred of Muslims as well as racial hatred of those predominantly associated with Islam—namely, Middle Eastern, Arabic-appearing people.<sup>15</sup>

Islamophobia most notably surged in Western cultures after al-Qaeda attacked the United States on September 11, 2001.<sup>16</sup> In response to the attack, stereotypes of the iconic "Muslim terrorist" were perpetuated in the media, by politicians, and in the entertainment industry, not only in the United States, but also throughout Europe.<sup>17</sup>

<sup>11</sup> 395 U.S. 444 (1969).

<sup>12</sup> 340 U.S. 315 (1951).

<sup>13</sup> TODD H. GREEN, *THE FEAR OF ISLAM: AN INTRODUCTION TO ISLAMOPHOBIA IN THE WEST* 3 (2015).

<sup>14</sup> COUNCIL ON AMERICAN-ISLAMIC RELATIONS, <http://www.islamophobia.org/about.html> (last visited Jan. 28, 2016).

<sup>15</sup> This includes non-Muslims who are perceived to be Muslims by Islamophobes. For example, there has been a spike in hate-inspired attacks on Sikhs since 2001. *History of Hate: Crimes Against Sikhs Since 9/11*, HUFFINGTON POST (Aug. 7, 2012), [http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911\\_n\\_1751841.html](http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911_n_1751841.html).

<sup>16</sup> See CARL W. ERNST, *ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE* 1, (2013).

<sup>17</sup> See, e.g., *id.*

Particularly, this Note is concerned with Islamophobia in the form of political cartoons and the violent responses that follow. As mentioned above, depictions of the Prophet Muhammad as political cartoons are intrinsically Islamophobic because such cartoons explicitly violate the Islamic faith's prohibition on idolatry and visual representations of the Prophet Muhammad.<sup>18</sup> Additionally, these political cartoons are typically made in defiance of and with animus towards Islam for the purpose of satirizing the religion's set of beliefs.<sup>19</sup>

#### *A. Jyllands-Posten and the Faces of Muhammad Controversy*

The first highly-publicized instance of Islamophobic depictions of the Prophet Muhammad occurred in 2005 in the popular Denmark newspaper, *Jyllands-Posten*.<sup>20</sup> Four years after the 9/11 attacks, *Jyllands-Posten*, "a right-leaning [conservative] Danish newspaper" notorious for taking anti-migrant positions, was involved in the "Face[s] of Muhammad" controversy.<sup>21</sup> The culture editor of *Jyllands-Posten* sent a request to 42 cartoonists around Europe seeking illustrations of the Muslim Prophet Muhammad to be published in the newspaper.<sup>22</sup> Only 12 cartoonists replied to *Jyllands-Posten*'s request with submissions of "cartoons or caricatures" of the Prophet Muhammad, which were all published in the newspaper on September 30, 2005.<sup>23</sup> Of the published illustrations, some of the most offensive included depictions of the Prophet Muhammad as a stick fig-

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<sup>18</sup> See Burke, *supra* note 5.

<sup>19</sup> E.g., Catherine Taibi, *These Are The Charlie Hebdo Cartoons That Terrorists Thought Were Worth Killing Over*, HUFFINGTON POST (Jan. 7, 2015), [http://www.huffingtonpost.com/2015/01/07/charlie-hebdo-cartoons-paris-french-newspaper-shooting\\_n\\_6429552.html](http://www.huffingtonpost.com/2015/01/07/charlie-hebdo-cartoons-paris-french-newspaper-shooting_n_6429552.html). Given the history of outrage for these depictions, it is safe to assume that the journalists were aware of why the depictions are offensive.

<sup>20</sup> GREEN, *supra* note 13, at 190-91.

<sup>21</sup> *Id.* at 190-203; see also *Jyllands-Posten Muhammad Cartoons Controversy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jyllands-Posten\\_Muhammad\\_cartoons\\_controversy](https://en.wikipedia.org/wiki/Jyllands-Posten_Muhammad_cartoons_controversy) (last visited Mar. 3, 2016).

<sup>22</sup> GREEN, *supra* note 13, at 191.

<sup>23</sup> *Id.* at 192.

ure angrily wielding a scimitar saying "[s]top stop [sic] we ran out of virgins," and, most notably, wearing a bomb-shaped turban with the Arabic writing of the Islamic declaration of faith, or *Shahada*: "There is no god but God, and Muhammad is His messenger."<sup>24</sup>

The response to these published cartoons was worldwide, varied, and at times, violent. In support of freedom of speech and freedom of the press, various European newspapers "republished the cartoons as a gesture of solidarity with Denmark and *Jyllands-Posten*," whereas the United Kingdom and the United States largely shied away from the controversy.<sup>25</sup> One of the republishing newspapers was the French satirical newspaper, *Charlie Hebdo*.<sup>26</sup> The republishings of these cartoons led to vehement criticism from not only Muslims in European countries, but also the Muslim community at-large.<sup>27</sup>

Members of the Muslim community responded in non-violent ways such as boycotting Danish products throughout the Middle East<sup>28</sup> and periodically protesting *Jyllands-Posten*.<sup>29</sup> Additionally,

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<sup>24</sup> *Id.* at 192; *Cartoons of Muhammad*, ASSYRIAN INT'L NEWS AGENCY (Feb. 1, 2006), <http://www.aina.org/releases/20060201143237.htm> (featuring all twelve depictions of Muhammad which were published in the "Faces of Muhammad" issue).

<sup>25</sup> GREEN, *supra* note 13, at 195 (noting that with the exception of the *Philadelphia Inquirer* and the *New York Sun*, who republished one or more of these cartoons, the United States largely stayed away from the controversy).

<sup>26</sup> Thierry Leveque, *French Court Clears Weekly in Mohammad Cartoon Row*, THOMPSON REUTERS (Mar. 22, 2007), <http://www.reuters.com/article/industry-france-cartoons-trial-dc-idUSL2212067120070322> ("A French court on Thursday ruled in favor of a satirical weekly that had printed cartoons of the Prophet Mohammad, rejecting accusations by Islamic groups who said the publication incited hatred against Muslims.").

<sup>27</sup> See GREEN, *supra* note 13, at 194–95.

<sup>28</sup> *Id.* at 194 ("[A] boycott on Danish goods swept through the Middle East beginning in late January 2006 and lasting into the spring. Danish companies such as Arla, Scandinavia's largest dairy producer, suffered significantly from the boycott. In fact, Danish exports across the board suffered huge losses during that period.").

<sup>29</sup> See *Jyllands-Posten Muhammad Cartoons Controversy*, BERKLEY CENT. FOR RELIGION, PEACE & WORLD AFFS. AT GEO. UNIV., <http://berkleycenter.georgetown.edu/essays/em-jyllands-posten-em-muhammad-cartoons-controversy>.

ambassadors from Muslim countries sought to stop the offensive publications by sending letters to Denmark Prime Minister Anders Fogh Rasmussen.<sup>30</sup> Despite the controversy, Prime Minister Rasmussen firmly stood by the Danish newspaper and replied concisely: "Freedom of expression is absolute."<sup>31</sup> Prime Minister Rasmussen's unapologetic tone arguably "added fuel to the fire" and set off a series of violent responses throughout the Muslim world. In fact, this controversy also elicited criticisms from the U.S. State Department<sup>32</sup> and former President Bill Clinton.<sup>33</sup>

In an unpredicted, violent response to the Prime Minister's words, many Danish embassies in Muslim countries were attacked and set ablaze: namely, in Damascus, Syria,<sup>34</sup> Beirut, Lebanon,<sup>35</sup> Tehran, Iran,<sup>36</sup> and Islamabad, Pakistan.<sup>37</sup> These attacks left dozens of

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<sup>30</sup> *Id.* at 193 ("On October 12, ambassadors and representatives from eleven Muslim countries wrote a letter to Anders Fogh Rasmussen, Denmark's prime minister, criticizing what they believed was a campaign to demean Muslims.").

<sup>31</sup> GREEN, *supra* note 13, at 194.

<sup>32</sup> Lloyd Vries, *U.S.: Muhammad Cartoon "Offensive"*, CBS NEWS (Feb. 3, 2006), <http://www.cbsnews.com/news/us-muhammad-cartoon-offensive/> ("The State Department criticized on Friday cartoon drawings in Europe of the Prophet Muhammad, calling them 'offensive to the beliefs of Muslims.' While recognizing the importance of freedom of the press and expression, department press officer Janelle Hironimus said these rights must be coupled with press responsibility.").

<sup>33</sup> Tim Graham, *Bill Clinton Protests "Outrageous" Anti-Islam Cartoons, But What About WashPost "Art"?*, NEWSBUSTERS (Feb. 2, 2006, 10:17 PM), <http://www.newsbusters.org/blogs/tim-graham/2006/02/02/bill-clinton-protests-outrageous-anti-islam-cartoons-what-about-washpost#sthash.IncK9098.dpuf> ("Former US president Bill Clinton warned of rising anti-Islamic prejudice, comparing it to historic anti-Semitism as he condemned the publishing of cartoons depicting Prophet Mohammad in a Danish newspaper. 'So now what are we going to do? . . . Replace the anti-Semitic prejudice with anti-Islamic prejudice?' he said at an economic conference in the Qatari capital of Doha.").

<sup>34</sup> *Embassies Burn in Cartoon Protest*, BBC NEWS (Feb. 4, 2006, 23:27 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/4681294.stm](http://news.bbc.co.uk/2/hi/middle_east/4681294.stm).

<sup>35</sup> *Danish Embassy in Beirut Torched*, BBC NEWS (Feb. 5, 2006, 19:35 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/4682560.stm](http://news.bbc.co.uk/2/hi/middle_east/4682560.stm).

<sup>36</sup> *Danish Embassy in Tehran Attacked*, GUARDIAN (Feb. 6, 2006, 14:11 EST), <http://www.theguardian.com/world/2006/feb/06/religion.uk1>.

Scandinavians and Muslims wounded, and in some cases, dead.<sup>38</sup> Unfortunately, because of the severity of these attacks, the nonviolent protesters were overshadowed. So began the cycle of Islamophobic speech that continues to incite violence attributed to the whole religion of Islam rather than law-breaking extremists.

### *B. The Charlie Hebdo Shooting*

More recently, the French satirical newspaper, *Charlie Hebdo*, suffered a tragic attack in response to political cartoons of the Prophet Muhammad in January 2015.<sup>39</sup> On January 7, 2015, two heavily armed French-Muslim gunmen, later identified as brothers Chérif and Saïd Kouachi,<sup>40</sup> attacked the headquarters in response to the newspaper's long-standing anti-religious views, trivialization of Islam, and most notably, satirical depictions of the Prophet Muhammad.<sup>41</sup> The attack left 12 journalists dead and 11 wounded.<sup>42</sup>

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<sup>37</sup> Jane Perlez & Pir Zubair Shah, *Embassy Attack in Pakistan Kills at Least 6*, N.Y. TIMES (Jun. 3, 2008), <http://www.nytimes.com/2008/06/03/world/asia/03pakistan.html>. This attack occurred much later than the first three, but was notably perpetrated by al-Qaeda. *Id.*

<sup>38</sup> See GREEN, *supra* note 13, at 193–94.

<sup>39</sup> Adam Withnall & John Lichfield, *Charlie Hebdo Shooting: At Least 12 Killed as Shots Fired at Satirical Magazine's Paris Office*, INDEPENDENT (Jan. 7, 2015), <http://www.independent.co.uk/news/world/europe/charlie-hebdo-shooting-10-killed-as-shots-fired-at-satirical-magazine-headquarters-according-to-9962337.html>.

<sup>40</sup> Lizzie Dearden, John Lichfield & Cahal Milmo, *Charlie Hebdo Attack: Paris Police Name Three Suspects in Manhunt as Kouachi Brothers and Surrendered, 18-year-old "Accomplice"*, INDEPENDENT (Jan. 7, 2015), <http://www.independent.co.uk/news/world/europe/charlie-hebdo-attack-hunt-continues-for-three-gunmen-who-massacred-12-journalists-and-police-9963499.html>.

<sup>41</sup> See Withnall and Lichfield, *supra* note 39; Loulla-Mae Eleftheriou-Smith, *Charlie Hebdo: A Profile of the Satirical Magazine*, INDEPENDENT (Jan. 7, 2015), <http://www.independent.co.uk/news/world/europe/charlie-hebdo-a-profile-of-the-french-satirical-magazine-9962720.html>; see generally Max Read, *What Is Charlie Hebdo? The Cartoons that Made the French Paper Infamous*, GAWKER (Jan. 7, 2015, 10:35AM), <http://gawker.com/what-is-charlie-hebdo-and-why-a-mostly-complete-histo-1677959168> (illustrating many examples of the maga-



Somewhat like the Faces of Muhammad controversy involving *Jyllands-Posten* only nine years prior, the *Charlie Hebdo* attack was met with varied responses. However, for the most part, the attack sparked widespread support in the mourning of the journalists who were killed and wounded—particularly facilitated by the #JeSuisCharlie (“I am Charlie” in French) campaign.<sup>43</sup>

Interestingly, despite *Jyllands-Posten* being the first newspaper to post depictions of the Prophet Muhammad, they were not supporters of *Charlie Hebdo* and its controversial depictions in 2015.<sup>44</sup> In fact, *Jyllands-Posten* was the only Denmark daily newspaper that chose not to republish *Charlie Hebdo*’s cartoons in the aftermath of the attack.<sup>45</sup> The chief editor of *Jyllands-Posten*, Jørn Mikelsen, defended his decision, stating, “I maintain the right as an editor to be able to print all types of drawings again at some point. Just not right now . . . . The truth is that for us it would be completely irresponsible to print old or new Prophet [Muhammad] drawings right now.”<sup>46</sup>

Additionally, *Jyllands-Posten*’s foreign editor and orchestrator of the Faces of Muhammad inquiry, Flemming Rose, said that, “*Jyllands-Posten* has stood alone the past nine years [and] [n]o one at any point has worn ‘je suis *Jyllands-Posten*’ t-shirts in the way they have with *Charlie Hebdo*.”<sup>47</sup> Rose received heavy criticism from media peers, and some suspected that *Jyllands-Posten* had “caved to ji-

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zine’s anti-religious stance and including the “Charia Hebdo” issue which is linked to the January 2015 attack).

<sup>42</sup> Withnall and Lichfield, *supra* note 39.

<sup>43</sup> See Sian Boyle, *Je Suis Charlie! The Cry of Defiance: Vast Crowds Rally Across the World to Condemn the Gun Massacre as Francoise Hollande Declares Tomorrow a Day of Mourning*, DAILY MAIL (Jan. 7, 2015), <http://www.dailymail.co.uk/news/article-2900835/Crowds-gather-central-Paris-solidarity-murdered-Charlie-Hebdo-journalists-slogan-Je-Suis-Charlie.html> (“[I]n London and around the world with crowds holding placards bearing the slogan #JeSuisCharlie, which means ‘I am Charlie’ in French.”).

<sup>44</sup> Jacob Wheeler, *The Newspaper that First Published Muhammad Cartoons Doesn’t Stand with Charlie Hebdo*, THE DAILY BEAST (Jan. 13, 2015), <http://thebea.st/1svJRUv>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *id.*

hadists.”<sup>48</sup> During one interview, Rose was asked if militant Islamists control newsroom decisions.<sup>49</sup> Rose replied, “Yes, it’s true. [Militant Islamists] already do,”<sup>50</sup> thus showing a chilling effect in the leadership of *Jyllands-Posten* newsroom.

### C. The “Draw Muhammad” Contest

After the *Charlie Hebdo* shooting, the next attack related to Islamophobic speech occurred at the Curtis Curwell Center of Garland, Texas. As mentioned in Part I, the American Freedom Defense Initiative (“ADFI”) hosted the “Draw Muhammad” Contest on May 3, 2015, which awarded a cash prize to the best caricature of the Muslim prophet.<sup>51</sup> AFDI, also known as Stop Islamization of America, is a recognized hate group led by Pamela Geller.<sup>52</sup> Geller is known for opposing the construction of a Muslim community center near ground zero of the World Trade Center<sup>53</sup> and for launching anti-Muslim ad campaigns in major metropolitan areas like New York City and Boston.<sup>54</sup> Therefore, unlike *Jyllands-Posten* and *Charlie Hebdo*, AFDI hosted the event from a blatant Islamophobic position, and its depictions of the Prophet Muhammad were not an “accessory” to a newspaper or magazine, but rather the central purpose of the event.

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Stack, *supra* note 1; see also Eyder Peralta, *5 Things To Know About The Organizers Of Muhammad Cartoon Contest*, NAT’L PUB. RADIO (May 4, 2015, 11:23 AM), <http://www.npr.org/sections/thetwo-way/2015/05/04/404158281/5-things-to-know-about-the-organizers-of-mohammed-cartoon-contest>.

<sup>52</sup> Robert Steinback & Bri Hermanson, *The Anti-Muslim Inner Circle*, SOUTHERN POVERTY LAW. CENTER (June 17, 2011), <https://www.splcenter.org/fighting-hate/intelligence-report/2011/anti-muslim-inner-circle>.

<sup>53</sup> See Tanya Somanader, *Pam Geller: Park51 Is “The Second Wave of the 9/11 Attack,”* THINK PROGRESS (Nov. 24, 2010, 2:40 PM) <http://thinkprogress.org/politics/2010/11/24/131936/pam-geller-park51/>.

<sup>54</sup> *E.g.*, *Am. Freedom Def. Initiative v. Mass. Bay Transp.*, 781 F.3d 571 (1st Cir. 2015).

The art contest, which took place four short months after the *Charlie Hebdo* shooting, was conducted in direct defiance of Islamic sensitivities.<sup>55</sup> The event organizers clearly anticipated a violent response, as they spent “upwards of \$50,000” on security.<sup>56</sup> In interviews following the event, Geller claimed to be standing up to the “liberal media’s” cowardice and the “savages” who perpetrated the attacks on *Charlie Hebdo*.<sup>57</sup> Additionally, the art contest was the first notable instance of the depiction of the Prophet Muhammad to take place in the United States and the first time Americans were attacked for that reason.<sup>58</sup> In the aftermath, ISIL showed admiration for the shooting and lauded the gunmen’s efforts.<sup>59</sup> ISIL went as far claiming responsibility for influencing the gunmen to attack.<sup>60</sup>

#### *D. Governmental Response*

Although no one was killed in Garland—other than the attackers—and the only person injured was a security guard,<sup>61</sup> this event is still concerning. Will events like the “Draw Muhammad” Contest continue to occur in the United States? Will these contests also be followed by a violent retaliatory response? Where, if anywhere, does the First Amendment allow the government to step in?

The depictions of the Prophet Muhammad, aggressive Islamophobia, and the retaliatory attacks have created a profound conflict between the First Amendment and the government’s interest in public safety and national security. Loretta Lynch, the Attorney General of the United States, has specifically addressed the issue of “anti-

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<sup>55</sup> See Holly Yan, *Garland Shooting: What is the American Freedom Defense Initiative?*, CNN (May 4, 2015, 2:42 PM), <http://www.cnn.com/2015/05/04/us/what-is-american-freedom-defense-initiative/> (featuring video interview with Pamela Geller stating that she spent \$50,000 on security).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See Stack, *supra* note 1.

<sup>59</sup> See Watson, *supra* note 6.

<sup>60</sup> *Id.*

<sup>61</sup> Stack, *supra* note 1.

Muslim" (or Islamophobic) speech which incites violence.<sup>62</sup> Her words may be a preview of the White House and Department of Justice's intentions to prosecute such speakers.<sup>63</sup> In speeches, Lynch has noted the large spike in hate crimes which have taken place both against Muslims and perceived Muslims in recent years,<sup>64</sup> speech which she considers "un-American" and overall counterproductive to the United States' endeavors in fighting terrorism.<sup>65</sup> Though these statements were made recently and a formal plan has yet to be presented, Attorney General Lynch's statements show the White House is aware of the conflict between freedom of speech and public safety and is continuing to investigate it.

The remainder of this Note will explore this conflict, and consider whether a federal or state government can, consistent with the First Amendment, limit Islamophobic speech, such as depictions of the Prophet Muhammad, on grounds of public safety and nation security concerns. Further, this Note will consider whether the First Amendment allows the government to censor or regulate depictions of the Prophet Muhammad to prevent the incitement of violence by Islamic extremists.

### III. METHODS OF CONTENT-BASED CENSORSHIP IN THE UNITED STATES

#### A. Chaplinksy Categories

In a historic opinion, *Chaplinksy v. New Hampshire*<sup>66</sup> laid the foundation of modern First Amendment jurisprudence for the types of speech that may be proscribed, and the Supreme Court of the United States has been reluctant to consider adding more to the

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<sup>62</sup> Josh Gerstein, *Lynch Recalibrates Message on Hateful Speech*, POLITICO (Dec. 17, 2015), <http://www.politico.com/blogs/under-the-radar/2015/12/lynch-recalibrates-message-on-hateful-speech-216488>.

<sup>63</sup> *Id.*

<sup>64</sup> TRUENEWS VIDEO: AG Loretta Lynch to Prosecute "Anti-Muslim Speech," YOUTUBE (Dec. 4, 2015), <https://www.youtube.com/watch?v=qBkPcRSi03o>.

<sup>65</sup> *Id.*

<sup>66</sup> 315 U.S. 568 (1942).

list.<sup>67</sup> While *Chaplinsky* itself focused exclusively on "fighting" words, the Court nonetheless broadly identified the following types of speech that are "low-value" and do not receive heightened First Amendment protection: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>68</sup>

Because the depictions of the Prophet Muhammad are not typically sexualized—at least to the point warranting a First Amendment analysis of obscenity or lewdness<sup>69</sup>—the obscenity and lewdness exceptions will be conceded as inapplicable and will not be addressed here. Also, since the Prophet is not capable of being "defamed" pursuant to common law,<sup>70</sup> libelous speech will also be considered inapplicable.

### 1. Profanity

The leading authority regarding First Amendment profanity is *Cohen v. California*.<sup>71</sup> In *Cohen*, the speaker was convicted under California Penal Code § 415, which prohibited "maliciously and willfully disturbing the peace or quiet of any neighborhood or person . . .

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<sup>67</sup> *E.g.*, *United States v. Stevens*, 559 U.S. 460, 469 (2010) ("The Government argues that 'depictions of animal cruelty' should be added to the [*Chaplinsky*] list. It contends that depictions of 'illegal acts of animal cruelty' . . . 'lack expressive value,' and may accordingly 'be regulated as *unprotected* speech' . . . . The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

<sup>68</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>69</sup> See *Roth v. United States*, 354 U.S. 476, 487 (1957) ("However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."); see also *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (administering an obscenity and lewdness test for a nude drive-through theater).

<sup>70</sup> Common law defamation has four elements: (1) a defamatory statement; (2) publishing of that statement; (3) the published statement is of and concerns the plaintiff; (4) the defamatory statement has somehow damaged the plaintiff's reputation. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (establishing the "actual malice" requirement for defamation and libel of public figures).

<sup>71</sup> 403 U.S. 15 (1971).

by . . . offensive conduct.”<sup>72</sup> The speaker wore a jacket displaying the phrase, “Fuck the Draft” outside of a municipal courthouse where “women and children [were] present.”<sup>73</sup> Justice Harlan, speaking for the majority, reversed Cohen’s conviction on the grounds that the “State may not . . . make the simple public display . . . of this single four-letter expletive a criminal offense.”<sup>74</sup> Additionally, “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”<sup>75</sup> In his opinion, Justice Harlan sought to make a doctrinal decision which implicated our “fundamental societal values” regarding the freedom of speech, rather than a narrow case-by-case approach to petitioner’s creative, or “trifling,” way of voicing dissent to the Vietnam War.<sup>76</sup> As Justice Harlan noted, “[O]ne man’s vulgarity is another’s lyric.”<sup>77</sup>

Since *Cohen*, the Supreme Court has been particularly unwilling to uphold outright bans on certain expressions because a state legislature found them “profane” or offensive,<sup>78</sup> unless the speech is so pervasive that it cannot be avoided without “prior warnings.”<sup>79</sup> This proves that the Court is reluctant to make bright-line rules which render specific speech, even if widely understood as patently offensive to the “most squeamish” audiences (like “fuck”), subject to censorship to prevent it from offending people.

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<sup>72</sup> *Id.* at 16 (quotations omitted).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 25.

<sup>76</sup> *Id.* at 25 (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”).

<sup>77</sup> *Id.*

<sup>78</sup> *E.g.*, *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975) (invalidating nudity ban for drive-thru theaters) (“Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to ‘avoid further bombardment of (his) sensibilities simply by averting (his) eyes.’”) (quoting *Cohen*, 403 U.S. at 21).

<sup>79</sup> *E.g.*, *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality opinion) (upholding the Federal Communications Commission’s decision to not broadcast George Carlin’s “Filthy Words” monologue including extensive discussion of the words “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits”).

To justify censorship based on profane content, the government must prove that the content-based restriction advances a narrowly tailored and compelling interest.<sup>80</sup> Attempts to censor sacrilegious speech and symbolism for its profane nature have failed since *Cohen*. For example, in *Skokie v. National Socialist Party*,<sup>81</sup> the Illinois Supreme Court faithfully applied the standard from *Cohen* and found that Neo-Nazi parades in the predominantly Jewish town (including many Holocaust survivors) failed to satisfy a narrowly tailored compelling interest.<sup>82</sup>

Similarly, attempts by other religious groups to censor speech have also failed under *Cohen*. For example, in *Snyder v. Phelps*,<sup>83</sup> the Court recognized the Westboro Baptist Church funeral protests and verbal assaults of the believers of any monotheistic religion (primarily Christianity) were protected by the First Amendment.<sup>84</sup> Additionally, in *NEA v. Finley*<sup>85</sup> the Court gave First Amendment protection to a photograph entitled *Piss Christ*, which depicts a miniature crucifix immersed in the artist's urine.<sup>86</sup> This federally-funded artistic photograph was protected speech even though the piece is highly offensive to Christians (particularly Catholics).<sup>87</sup> Though these are only a few examples, one could argue that since all these other religions have to put up with profane, sacrilegious ex-

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<sup>80</sup> *E.g., id.* at 762 (upholding the FCC's decision with "society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes").

<sup>81</sup> *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 69 Ill.2d 605 (1978).

<sup>82</sup> *Id.* at 612 ("The decisions of [the United States Supreme Court], particularly *Cohen* . . . , in our opinion compel us to permit the demonstration as proposed, including display of the swastika.")

<sup>83</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>84</sup> *Id.* at 459–60.

<sup>85</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding the NEA's decision to redistribute funding from Andres Serrano after criticism, but stating that Serrano did in fact receive federal funding for his piece); see also *Piss Christ*, UNIV. OF SOUTHERN CALIFORNIA, <https://www.usc.edu/schools/annenberg/asc/projects/comm544/library/images/502.html> (last visited Feb. 18, 2016).

<sup>86</sup> See *Finley*, 524 U.S. at 574.

<sup>87</sup> See *id.* at 606.

pressions that satirize and at times disparage their faith, why should Islam have special consideration through categorical censorship?

Considering *Cohen* and the history of proscribing profanity, it is unlikely that this kind of content-based limitation on depictions of the Prophet Muhammad would survive scrutiny. First, the applicability of *Cohen* to depictions of the Prophet Muhammad is not immediately clear since the depictions do not contain words. *Cohen* and its progeny concern the proscription of "taboo words" laden in an expression of speech.<sup>88</sup> However, if we consider taboo to be a "proscription on behavior for a specific community in a specific context,"<sup>89</sup> then a depiction of the Prophet Muhammad would be a taboo expression. Consequently, the "proscribed behavior" is the act of depicting the Prophet Muhammad, and the "specific community and context" are Muslims. Arguably, this broad conceptualization of taboo could allow for depictions of the Prophet Muhammad to be interpreted as profane to a certain audience.

Here, the compelling interest for a proscription of depictions of the Prophet Muhammad for their profanity could be arguably justified as not offending Muslims. This justification, however, will surely be insufficient. Absent any reason for giving the religion of Islam preferential treatment, almost all conceivable religions in the United States are unprotected from speech they find offensive.

This argument illustrates why efforts to censor depictions of the Prophet Muhammad as profane speech will fail. Just like other expressions that are offensive to certain audiences, existing First Amendment jurisprudence will not support censorship for its offensiveness. But the analysis of the traditional low-value speech categories does not end here.

## 2. Fighting Words

The strongest argument for wanting to limit or otherwise censor depictions of the Prophet Muhammad is not to focus on the

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<sup>88</sup> See generally *Cohen v. California*, 403 U.S. 15 (1971); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>89</sup> CHRISTOPHER M. FAIRMAN, *FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES* 27 (2009).



offensiveness of any given depiction, but rather to consider the hostile reaction the expression incites. Thus, the remaining *Chaplinsky* category to be addressed is the fighting words doctrine—speech which by its very utterance provokes a hostile reaction.<sup>90</sup>

In *Chaplinsky*, the criminal defendant was a Jehovah's Witness who was distributing literature on a busy street in Rochester, New Hampshire.<sup>91</sup> While distributing the literature, Chaplinsky was believed to be denouncing all religion as a "racket," and called local public officials and other passersby "damned Fascists."<sup>92</sup> Pursuant to New Hampshire state statute, Chaplinsky was charged and convicted for unlawfully "address[ing] any offensive, derisive or annoying word to any other person" on a public street.<sup>93</sup>

The issue presented before the Court was whether Chaplinsky's speech could be punished or otherwise censored by state action, implicating First Amendment protection through the Fourteenth Amendment's incorporation.<sup>94</sup> The Court, speaking through Justice Murphy, rejected Chaplinsky's plea for protection and quoted *Cantwell v. Connecticut*<sup>95</sup> to hold that "epithets or personal abuse [are] not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."<sup>96</sup> Further, this case presented an objective standard used by the New Hampshire state court to determine when to apply its fighting words statute: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The test is what men of common

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<sup>90</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>91</sup> *Id.* at 569.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (citation omitted) ("No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.").

<sup>94</sup> *See id.* at 570.

<sup>95</sup> 310 U.S. 296 (1940) (reversing the breach of peace conviction of Jehovah's Witness who played a record to people including defamatory statements towards the Catholic Church).

<sup>96</sup> *Chaplinsky*, 315 U.S. at 572; *Cantwell*, 310 U.S. at 309-10.

intelligence would understand would be words likely to cause an average addressee to fight.”<sup>97</sup>

Despite this demarcation, the fighting words doctrine has been anything but clear. Even the definition of phrase itself, “fighting word,” has not been obvious. We know that calling someone a “damned Fascist” in 1942 Rochester, New Hampshire was punishable, but it would be naïve to believe the same is true in 2015. After reading *Cantwell* and *Chaplinsky*, one would believe that somewhere in the annals of First Amendment jurisprudence exists an exhaustive list of “fighting words” written by the Supreme Court. Unfortunately, any legal scholar pursuing this search would leave empty-handed and unsatisfied.

However, we do know a few things about fighting words from subsequent Supreme Court cases. First, for speech to be considered under this doctrine, the speech must be a “direct personal insult or an invitation to exchange fisticuffs.”<sup>98</sup> In *Texas v. Johnson*,<sup>99</sup> the Court rejected the state’s argument that burning the United States flag could be construed as fighting words because, as stated by Justice Brennan, “No reasonable onlooker would have regarded Johnson’s [burning of the flag]” as an insult meant for them.<sup>100</sup> Therefore, the fighting words doctrine is not invariably invoked just because the speaker’s expression could provoke someone who sees or hears it (*e.g.*, a patriotic citizen seeing someone desecrate the flag).

This “direct target” requirement of the fighting words doctrine differentiates it from the other low-level speech categories—with the exception of libelous speech—and thus makes it difficult to apply. In fact, the Supreme Court has not upheld a conviction based on the fighting words doctrine since the *Chaplinsky* decision 73 years

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<sup>97</sup> *Chaplinsky*, 315 U.S. at 573.

<sup>98</sup> *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also *Street v. New York*, 394 U.S. 576, 592 (1969) (holding that a demonstration by a civil rights leader who burned an American flag in public protest was not “so inherently inflammatory as to come within that small class of ‘fighting words’”).

ago.<sup>101</sup> This has led many legal scholars to consider the fighting words doctrine as effectively dormant, meaningless, and “nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression.”<sup>102</sup> Although debate of the fighting words doctrine’s effectiveness continues, this Note will accept its doctrinal value and apply it for the sake of analysis.

In order to classify depictions of the Prophet Muhammad as “fighting words” worthy of censorship, state officials could argue that these depictions are directly targeted at all members of the Muslim community. If we consider these depictions to be Islamophobic speech because of their “blasphemous” nature, it follows that demonizing and ridiculing Islam and its believers—the apparent goal of Islamophobia—is analogous to an “invitation to exchange fist-cuffs” in Justice Brennan’s view.<sup>103</sup> Therefore, Muslims, as a class, are the direct target of these fighting words. One downfall of this argument is that its next logical conclusion would be that all other derogatory and discriminatory statements and expressions directed towards a religious, racial, ethnic, or other “targeted class” of people would invoke the fighting words doctrine.

Indeed, this “targeted class” theory invoking the fighting words doctrine has been rejected by the Supreme Court and other lower courts.<sup>104</sup> For example, reconsider the issue of flag burning. In *Street* and *Johnson*, the New York and Texas state governments respectively argued for recognizing federal employees or patriotic Americans as a targeted class for fighting words when someone desecrates the American flag.<sup>105</sup> The majority in both courts rejected this argument on grounds that the reasonable onlooker would not

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<sup>101</sup> GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 98 (4th ed. 2012).

<sup>102</sup> Stephen A. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980).

<sup>103</sup> *Johnson*, 491 U.S. at 397.

<sup>104</sup> See, e.g., *Street*, 394 U.S. 576 (reversing conviction of civil rights protestor burning American flag); *Johnson*, 491 U.S. 397 (invalidating Texas’s prohibition on flag desecration as fighting words); see also *Skokie v. Nat’l Socialist Party*, 69 Ill.2d 605 (1978) (invalidating injunction against Nazi protestors).

<sup>105</sup> See generally *Street*, 394 U.S. 576; *Johnson*, 491 U.S. 397.

feel directly attacked because of the tenuous relationship between the onlooker and the alleged target group.<sup>106</sup> Additionally, the targeted class theory fails when the class is more tangible than federal employees.

For instance, the Supreme Court of Illinois rejected the notion that the entire Jewish community of Skokie should be considered the target for fighting words.<sup>107</sup> *Skokie* is especially relevant because anti-Semitism and Islamophobia are arguably sides of the same discriminatory coin. In *Skokie*, the town sought injunctive relief from the National Socialist Party of America, a white supremacist, Neo-Nazi organization that planned to parade through the town of Skokie dressed in Nazi uniforms, brandishing swastikas, and carrying banners such as, "Free Speech for the White Man."<sup>108</sup> The town's concern was that the National Socialist Party specifically targeted Skokie to threaten the Jewish community and remind two million survivors of the Holocaust that "the Nazi threat is not over, [and the Holocaust] can happen again."<sup>109</sup>

The Illinois Supreme Court, after the Supreme Court of the United States remanded the case and allowed the Socialist Party's application for stay,<sup>110</sup> found for the Socialist Party and maintained that the injunction was an unconstitutional denial of speech protected by the First Amendment.<sup>111</sup> Specifically, the Illinois Court found that the depiction of a swastika was insufficient to satisfy the fighting words doctrine because it was not "so offensive and peace threatening to the public" to justify the town's injunction.<sup>112</sup> Although the Court acknowledged that "the sight of [a swastika] is so abhorrent to the Jewish citizens of Skokie . . . and [] the survivors of the Nazi per-

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<sup>106</sup> See *Street*, 394 U.S. at 592; *Johnson*, 491 U.S. at 397.

<sup>107</sup> *Skokie*, 69 Ill.2d at 615.

<sup>108</sup> *Id.* at 610.

<sup>109</sup> *Id.* at 611.

<sup>110</sup> *Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 43 (1977), *remanded*, *Skokie v. Nat'l Socialist Party*, 69 Ill.2d 605 (1978), *cert. denied*.

<sup>111</sup> *Skokie*, 69 Ill.2d at 615.

<sup>112</sup> *Id.*

secutions," it also found that "this factor does not justify enjoining [the Socialist Party's] speech."<sup>113</sup>

Given the decisions in *Johnson, Street*, and *Skokie*, one could reasonably expect that applying the fighting words doctrine to protect a group of Muslims will also not pass First Amendment scrutiny. It is difficult to imagine a more applicable target of fighting words than the Holocaust survivors living in Skokie, Illinois, who were taunted and reminded of their Nazi tormentors who killed and tortured their friends and family.

Still, there is also a key difference between a swastika and depictions of the Prophet Muhammad that might not render the decision in *Skokie* controlling, which could allow for alternate venues of regulation beyond the exhaustive list of *Chaplinsky*. That difference is the context surrounding the expression. Arguably, a swastika and a Nazi parade in 1984 do not mean the same thing as an art exhibit solely for depicting the Prophet Muhammad does in 2015. In any kind of censorship analysis, it is imperative that we remember "the First Amendment does not command [us to use] tunnel vision."<sup>114</sup> Each issue need not be determined in a vacuum, unburdened by public sentiment and domestic or international concerns, nor should absolutist and rigid ideologies be favored. Instead, we should consider each expression in the context it is uttered or displayed.

For example, it is very likely that the *Skokie* Court would have ruled differently had it been decided thirty years earlier—in the wake of World War II—when the context of the expression would have been wholly different. The importance of context can explain many landmark cases, especially in First Amendment jurispru-

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<sup>113</sup> *Id.* at 617 ("We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.").

<sup>114</sup> Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1393 (2006).

dence that, taken out of their context, seem extreme or unsupported by existing doctrine.<sup>115</sup>

The decisions in *Schenck v. United States*<sup>116</sup> and its progeny affirmed convictions of protestors and public officials disrupting the war efforts.<sup>117</sup> Today, such a result would be unspeakable, but in the early twentieth century, that result was deemed necessary when the Red Scare of communism in America was real and concerning.<sup>118</sup> Additionally, consider the ruling in *West Virginia State Board of Education v. Barnette*<sup>119</sup> just after World War II, where Justice Jackson explained a “fixed star in our constitutional constellation” is that we must never “force citizens to confess” their allegiance to our flag, even in a public school, for that is what separates us from the totalitarian regimes we abhor.<sup>120</sup> And most recently, in *Holder v. Humanitarian Law Project*,<sup>121</sup> a majority of the Court upheld the Patriot Act’s criminal punishments for individuals who provided non-violent “ma-

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<sup>115</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students were protected by the First Amendment from being forced to salute the American flag and say the Pledge of Allegiance in school).

<sup>116</sup> 249 U.S. 47 (1919) (unanimously affirming the conviction of defendants who distributed anti-war documents to men who have accepted the draft).

<sup>117</sup> E.g., *Frohwerk v. United States*, 249 U.S. 204 (1919) (affirming conviction of German newspaper publishing articles which criticized World War I efforts); *Debs v. United States*, 249 U.S. 211 (1919) (affirming conviction of national leader of Socialist Party and presidential candidate, Eugene Debs, for speech which praised war dissenters and included anti-war themes); *Abrams v. United States*, 250 U.S. 616 (1919) (affirming conviction of defendants who threw anti-war leaflets from out windows).

<sup>118</sup> Landon R.Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RES. ENCYCS., (Jul. 2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-6>.

<sup>119</sup> 319 U.S. 624 (1943).

<sup>120</sup> *Barnette*, 319 U.S. at 624 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”).

<sup>121</sup> 561 U.S. 1 (2010) (preventing the Humanitarian Law Project from providing assistance to Turkish and Sri Lankan militant groups in peacefully resolving conflicts).

terial support" to terrorist organizations, a decision likely motivated by a desire to avoid legitimizing or in any way effectively supporting organizations like the one which attacked the United States on September 11, 2001.<sup>122</sup> A recurring theme in these landmark decisions is the Court's appreciation for the context in which they occur. It can be argued that the Court realizes there are exceptions to these rules and the proscription of certain expressions can be more or less justified because of context, thus transcending the *Chaplinsky* categories.

### B. *The Brandenburg Test*

Parallel to the *Chaplinsky* categories in First Amendment jurisprudence is a more recent test for speech which advocates for violence: the test developed in *Brandenburg v. Ohio*.<sup>123</sup> In *Brandenburg*, the leader of a Ku Klux Klan rally was convicted under Ohio's criminal syndicalism statute which punished the advocacy of violence as a means for political reform.<sup>124</sup> During the rally, in a private, secluded farm outside of Cincinnati, the leader made statements suggesting that Blacks be "returned" to Africa, Jews be "returned" to Israel, and called for a violent "revengeance [sic]" against the groups in an act to take back their city.<sup>125</sup> The Supreme Court, in a per curiam decision, reversed the conviction of the Klan leader and found the statute unconstitutional because the statements proscribed were punishable before any imminent harm occurred.<sup>126</sup>

Legal scholars have later interpreted the *Brandenburg* decision to require three elements before similar speech can be punished or limited: (1) express advocacy for violence (or unlawful action); (2) the advocated violence is immediate; and (3) the violence is like-

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<sup>122</sup> Serge Schmemmann, *Hijacked Jets Destroy Twin Towers and Hit Pentagon*, N.Y. TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/national/12PLAN.html>.

<sup>123</sup> 395 U.S. 444 (1969).

<sup>124</sup> *Id.* at 444-45.

<sup>125</sup> *Id.* at 446-47.

<sup>126</sup> *Id.* at 448-49.

ly to occur.<sup>127</sup> Many have argued that the *Brandenburg* advocacy test is too protective of speech and has been difficult to use to sustain a conviction, thus rendering the test hollow and unusable.<sup>128</sup> Despite its critics, the *Brandenburg* test is still highly relevant to assess depictions of the Prophet Muhammad.

The first element of the *Brandenburg* test is express advocacy for violence.<sup>129</sup> In the context of depictions of the Prophet Muhammad, one can argue that the “express advocacy for violence” would be the act of depicting the Prophet with the knowledge that such a depiction is inherently blasphemous to Muslims and could draw a violent retaliation. This argument, however, is not without flaws.

First, there is a stark difference between the kind of violent advocacy in *Brandenburg* and in the case of depicting the Prophet Muhammad. In *Brandenburg*, the speaker was a KKK member allegedly seeking to motivate his cohort to commit violent crimes.<sup>130</sup> In contrast, those depicting the Prophet Muhammad do so peacefully and do not commit violent acts themselves; instead they are attacked by radicalized gunmen responding to their depiction.<sup>131</sup> This distinction can be further equated to the difference between incitement (*Brandenburg*) and provocation (*Chaplinsky* fighting words). Thus, the *Brandenburg* test as it exists today is not applicable to these depictions.

For the sake of argument, the remaining two *Brandenburg* elements will also be considered briefly. The second and third elements, the immediacy of the advocated violence and the likelihood of the advocated violence, have a better argument to be satisfied. In the recent history of attacks responding to depictions of the Prophet Muhammad, we have seen that a specific event or publication has

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<sup>127</sup> Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (1994).

<sup>128</sup> *E.g.*, *Rice v. Paladin Enter.*, 128 F.3d 223 (4th Cir. 1997) (holding that *Brandenburg* is not controlling to prosecute the publisher of a hit man book which extolled the lifestyle of contract murders and teaching such methods with detail).

<sup>129</sup> Schwartz, *supra* note 127, at 241.

<sup>130</sup> *Brandenburg*, 395 U.S. at 444–45.

<sup>131</sup> *E.g.*, Stack, *supra* note 1.



been associated with the attack and served as a motive for the attackers.<sup>132</sup> Additionally, the likelihood of violence at these events is implicitly evidenced by Pamela Geller and the ADFI by their decision to spend \$50,000 on security, armed guards, and Garland police officers.<sup>133</sup> However, despite the immediacy and likelihood of the attack, the current *Brandenburg* test requires all elements to be satisfied, and the Supreme Court has set the standard for finding express advocacy (the first factor) remarkably high.<sup>134</sup> With the clear distinction between incitement and provocation, success on this legal theory is unlikely. Therefore, the existing *Brandenburg* advocacy for violence test will fail to proscribe depictions of the Prophet Muhammad.

Notwithstanding the inapplicability of the *Chaplinsky* categories and the existing *Brandenburg* test, this Note seeks to answer whether depictions of the Prophet Muhammad should be a type of expression that requires special treatment. In doing so, three alternate solutions will be presented: (1) government censorship through forum regulation; (2) a proposal for a modified *Brandenburg* test with a national security caveat; and (3) the resurgence of the Heckler's Veto.

#### IV. GOVERNMENT REGULATION BY FORUMS, NATIONAL SECURITY INTERESTS, AND THE HECKLER'S VETO

The government, unlike a private actor, has much less discretion when regulating free speech because much of government censorship is proscribed by the First Amendment.<sup>135</sup> However, notwith-

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<sup>132</sup> *E.g.*, Read, *supra* note 41.

<sup>133</sup> Yan, *supra* note 55.

<sup>134</sup> *E.g.*, *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (reversing the conviction of an antiwar protestor who shouted to "take the fucking street") ("At best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.").

<sup>135</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free

standing the *Chaplinsky* categories discussed above,<sup>136</sup> other exceptions exist for the government to make regulations and limitations to speech when they are sufficiently justified by varying standards of scrutiny.<sup>137</sup>

#### A. *Forum Regulation*

First, the government can regulate speech in certain forums. Particularly, there are three kinds of forums created by the government: traditional public forums (*e.g.*, public streets and parks),<sup>138</sup> designated public forums (*e.g.*, schools and public advertising spaces),<sup>139</sup> and nonpublic or limited forums (*e.g.*, military bases and prisons).<sup>140</sup> Of the three types of forums, traditional and designated public forums must show that when speech is regulated on the basis of content, the regulation is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication," thus satisfying strict scrutiny.<sup>141</sup> Alternatively, nonpublic or limited forums need only satisfy a standard akin to reasonableness or rational basis, showing that the proscribed speech was not within the type of speech for which the forum was "lawfully

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expression of others, no such protection or redress is provided by the Constitution itself.").

<sup>136</sup> See text accompanying note 63.

<sup>137</sup> *E.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a District of Columbia prohibition of sleeping in parks as a constitutional limitation on expressive speech); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding 36-foot buffer zone as a reasonable way to protect access to a health clinic from anti-abortion protestors).

<sup>138</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) ("This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks . . .").

<sup>139</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("A second category consists of public property which the State has opened for use by the public as a place for expressive activity.").

<sup>140</sup> See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

<sup>141</sup> *Perry*, 460 U.S. at 45.

dedicated.”<sup>142</sup> These are the relevant standards through which relevant government regulations of forums will be analyzed.

In the last few years, ADFI has been involved in an anti-Islam advertisement campaign across the United States. Particularly, their campaign involved three legal disputes with municipal transit authorities rejecting ADFI’s anti-Islam advertisements: New York,<sup>143</sup> Detroit,<sup>144</sup> and Boston.<sup>145</sup> In two of the three cases, the local municipal governments were successful in limiting ADFI’s defamatory advertisements,<sup>146</sup> but in one case, the local government failed because of a crucial, legally operative fact: the status of the forum.<sup>147</sup>

The first of the cases, and the only unsuccessful case for the government, took place in New York City.<sup>148</sup> Here, ADFI sought to run an advertisement on Metropolitan Transit Authority (“MTA”) buses that read as follows: “In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad.”<sup>149</sup> The MTA, following its written advertising standards, determined that this advertisement violated their “no-demeaning standard” which prohibits advertisements that “contain . . . information that demean[s] an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation.”<sup>150</sup> MTA further argued that ADFI’s advertisement implicitly equated Palestinians, Muslims, Arabs, or anyone who does not support Israel’s endeavors, to “savage[s],” thus directly opposed to their “no-demeaning” standard.<sup>151</sup> Though the

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<sup>142</sup> *Adderley*, 385 U.S. at 47.

<sup>143</sup> *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp.2d 456 (S.D.N.Y. 2012).

<sup>144</sup> *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 698 F.3d 885 (6th Cir. 2012).

<sup>145</sup> *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571 (1st Cir. 2015).

<sup>146</sup> *See generally Suburban Mobility Auth.*, 698 F.3d at 885; *Mass. Bay Transp. Auth.*, 781 F.3d at 571.

<sup>147</sup> *See generally Metro. Transp. Auth.*, 880 F. Supp. 2d at 456.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 459.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 464.

district court agreed that the MTA properly applied their “no-demeaning” standard,<sup>152</sup> the court accepted ADFI’s argument that the “no-demeaning” standard itself was an unconstitutional viewpoint discrimination because the MTA advertising space was considered a designated public forum.<sup>153</sup> Ultimately, the determination of the advertising space as a designated public forum served as a dispositive factor to rule in favor of the ADFI.

What made the MTA case unique is the operative precedent which declared that specific advertising space as a designated forum. Only about 15 years ago, the United States Court of Appeals for the Second Circuit in *New York Magazine v. Metropolitan Transportation Authority*<sup>154</sup> held that the exterior of a New York City public bus “was a designated public forum.”<sup>155</sup> That precedent was binding upon the district court when the AFDI case was argued.<sup>156</sup> Additionally, the district court in the AFDI decision limited its ruling to “not disable city authorities from adopting rules that hold ads and commentary on the exteriors of buses to a standard of civility.”<sup>157</sup> This case was merely the application of dominating precedent which tied the MTA’s hands from regulating later speech.

In contrast, Detroit successfully rejected ADFI’s Islamophobic advertisement proposal for their buses at the United States Court of Appeals for the Sixth Circuit.<sup>158</sup> In Detroit, ADFI submitted an advertisement which read as follows: “Fatwa on your head? Is your family

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<sup>152</sup> *Id.* at 468–69 (“MTA was reasonable—indeed, clearly correct—to regard the AFDI Ad as demeaning a group of people based on religion (Islam) and/or national origin and ancestry (from ‘Muslim countries’ in the Middle East).”).

<sup>153</sup> *Id.* at 476 (“MTA does not offer any justification or selectively allowing demeaning speech to appear on the exterior of its buses, let alone demonstrate that its content-based restriction on transit advertising is narrowly tailored to serve a compelling government interest, as is necessary to survive strict scrutiny.”).

<sup>154</sup> 136 F.3d 123 (1998).

<sup>155</sup> *Id.* at 130.

<sup>156</sup> *Metro. Trans. Auth.*, 880 F. Supp.2d at 470 (citing *New York Magazine*, 136 F.3d at 129).

<sup>157</sup> *Id.* at 477.

<sup>158</sup> *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 698 F.3d 885 (6th Cir. 2012).

or community threatening you? Leaving Islam? Got Questions? Get Answers! RefugefromIslam.com.”<sup>159</sup> Though arguably not Islamophobic, Detroit was able to reject this advertisement pursuant to its transit advertisement prohibitions on “political or political campaign advertising” and “advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.”<sup>160</sup> However, Detroit was successful in their prohibition because the Sixth Circuit found a nonpublic, limited forum to be present—therefore, the regulation is only subject to a “reasonableness” standard.<sup>161</sup> Further, the Sixth Circuit recognized that a prohibition on political speech satisfied the reasonableness required and found in favor of the City.<sup>162</sup>

Additionally, and most recently, Boston successfully rejected a round of ADFI’s Islamophobic advertisements for their buses at the United States Court of Appeals for the First Circuit.<sup>163</sup> The same “civilized man” versus “savages” advertisement was presented by the ADFI.<sup>164</sup> The Massachusetts Bay Transportation Authority (“MBTA”), like the MTA of New York, has a policy that rejects advertisements that disparage or demean individuals or a group of people.<sup>165</sup> However, unlike the MTA, the MBTA had dispositive precedent that supported their argument in defending their no-demeaning regulation.<sup>166</sup> In *Ridley v. Massachusetts Bay Transportation Authority*,<sup>167</sup> the First Circuit held that the restriction on the display of advertisements that “demean or disparage” individuals or groups does not violate the First Amendment.<sup>168</sup> The *Ridley* court’s finding was based on MBTA’s rejection of political advertisements, which evidenced the

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<sup>159</sup> *Id.* at 888.

<sup>160</sup> *Id.* at 888–89.

<sup>161</sup> *Suburban Mobility Auth.*, 698 F.3d at 892–93; *see also* *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

<sup>162</sup> *See Suburban Mobility Auth.*, 698 F.3d at 896.

<sup>163</sup> *See generally* *Am. Freedom Def. Initiative v. Mass. Bay Transp.*, 781 F.3d 571 (1st Cir. 2015).

<sup>164</sup> *Id.* at 575.

<sup>165</sup> *Id.* at 574.

<sup>166</sup> *Id.*

<sup>167</sup> 390 F.3d 65 (1st Cir. 2004).

<sup>168</sup> *Id.* at 96.

government's interest in making a limited forum rather than a designated public forum.<sup>169</sup> Thus, the First Circuit's reliance on *Ridley* trumped the AFDI's viewpoint discrimination argument and Boston successfully regulated Islamophobic speech.<sup>170</sup>

Given the success of Detroit and Boston, their strategy of limited forums and regulatory boards can be extended to depictions of Muhammad. For example, if ADFI or another similarly Islamophobic group sought to post depictions of Muhammad on subway cars, buses, trains, or other public transit vehicles, a municipality could readily reject this speech while looking towards the First and Sixth Circuit determinations for support. However, as with the case of New York, if the forums targeted for speech are either traditional or designated public forums, the government's ability to regulate speech is severely curtailed. This fatal designated public forum distinction likely would have been applied to the Curtis Curwell Center ("the Center") of Garland, Texas, the venue of the "Draw Muhammad" Contest, if the local government sought to prevent the art contest.

Absent any proof that the Center or the Town of Garland actually tried to prevent Pamela Geller from hosting the "Draw Muhammad" Art Contest, the municipality would likely fail because the Center is almost undeniably a designated public forum. This designation is supported by the Center's purpose, which is described as "providing the community of Garland a first-class facility which hosts a variety of events."<sup>171</sup> The Center's website shows that there are no explicit regulations for the speech allowed and presents examples of events ranging from weddings, church services, and corporate meetings.<sup>172</sup> However, the Center can still serve as an example, as New

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<sup>169</sup> *Id.* at 78 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) ("Most importantly, the relevant Supreme Court case law compels the conclusion that the MBTA has not created a designated public forum. The only Supreme Court case directly on point, the plurality opinion in [*Lehman*], found that where a city banned all "political" (i.e. candidate and issues) advertising on its transit system . . . the city had not created a designated public forum.")).

<sup>170</sup> *Mass. Bay Transp.*, 781 F.3d at 587–90.

<sup>171</sup> *About the Center*, CURTIS CURWELL CENT. (2015), [http://www.curtisculwellcenter.com/about\\_the\\_center/index.cfm](http://www.curtisculwellcenter.com/about_the_center/index.cfm).

<sup>172</sup> *See generally* CURTIS CURWELL CENT. (2015), <http://www.curtisculwellcenter.com/>.

York's MTA did, to show what a government forum must do to be reviewed with less than strict scrutiny.<sup>173</sup>

Naturally, the forum regulation strategy has a limit: Islamophobic speech and depictions of the Prophet Muhammad that occur outside a limited public forum. Regulation of limited forums is a powerful way for the government to limit certain kinds of speech with a lot of discretion, but it is a regulatory scheme with a very narrow reach. For these reasons, the second part of the proposed solution can be applied in scenarios beyond limited forums.

*B. National Security Justification and the Modified Brandenburg Test*

The second solution seeks to provide an option for the government to regulate speech beyond what limited and designated forums allow. Particularly, I propose a modified version of the *Brandenburg v. Ohio*<sup>174</sup> advocacy for violence test,<sup>175</sup> using national security as an additional consideration. However, because of the expansiveness of the second solution, it would be inevitably subject to very strict scrutiny as compared to the regulation of limited forums.

National security interests and considerations are not foreign to First Amendment jurisprudence. For instance, a notable time when the Supreme Court recognized national security was in *New York Times v. United States* ("*Pentagon Papers*").<sup>176</sup> In *Pentagon Papers*, the government sought to enjoin the New York Times and Washington Post with a prior restraint to prevent the disclosure and publication of allegedly sensitive reports regarding the Vietnam War.<sup>177</sup> In this instance, the government failed to meet its burden of national security, but it was nonetheless recognized in the opinion and accompanying concurrences by Justices Brennan, Stewart, and White.<sup>178</sup>

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<sup>173</sup> See generally *Metro. Transp. Auth.*, 880 F.Supp.2d 456 (S.D.N.Y. 2012).

<sup>174</sup> 395 U.S. 444 (1969).

<sup>175</sup> See *supra* Part III.B.

<sup>176</sup> 403 U.S. 713 (1971).

<sup>177</sup> *Id.* at 714.

<sup>178</sup> *Id.* at 714, 725-32.

Revisiting the *Brandenburg* test, I believe an adequate method for the government to justify suppression of Islamophobic speech should not only be considered under *Brandenburg*, but also with a deferential national security factor. For example, when speech falls short of express advocacy for violence or inciting a violent response, the government should be able to overcome the near miss of the traditional *Brandenburg* test with a showing of how contrary certain speech is to national security efforts. By incorporating this new element into the *Brandenburg* test, the government is no longer so restricted by a rigid application and search for express advocacy for lawbreaking. Instead, it can serve its interest in protecting its citizens at the expense of censoring hate speakers when their speech leads to the provocation of other unlawful actors.

As stated earlier, the First Amendment does not command us to use tunnel vision.<sup>179</sup> Using the examples from Denmark and France,<sup>180</sup> the government would have a strong argument that holding a "Draw Muhammad" Contest comes close to satisfying the *Brandenburg* test outright. The government has a legitimate national security interest in preventing events which historically have led to mass shootings, providing further support for the use of the new test. In balancing the harm between the suppressed speech of Islamophobic speakers with the prevention of an armed attack on a community, the latter should always trump the former. Speech is invaluable insofar as it expresses a political objective, but speech with an arguably dubious message cannot withstand the protection of human life and limb when recent history shows us how likely, violent, or deadly the response will be.<sup>181</sup>

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<sup>179</sup> Karst, *supra* note 114.

<sup>180</sup> See *supra* Part II.A-B.

<sup>181</sup> It is important to note that the national security interest is not permanent and ongoing. Particularly, it is relevant with regard to Islamophobic speech because of the United States' conflict with ISIL. Therefore, the national security interest in prohibiting Islamophobic speech wouldn't be as strong as it is now, thirty years ago, assuming that the conflict with ISIL has been resolved.



*C. Return of the Heckler's Veto*

The final solution provides another vehicle for censorship which requires action from both public and private actors. This solution is called the Heckler's Veto—a censorship theory which allows local law enforcement to suppress a speaker when his or her speech has or will imminently incite a crowd of retaliatory listeners.<sup>182</sup>

The Heckler's Veto originates from the majority opinion of *Feiner v. New York*<sup>183</sup> written by Chief Justice Vinson.<sup>184</sup> *Feiner* is a case that was decided in the years leading up to the African-American Civil Rights Movement and brought forth a holding which is difficult to defend because of its unflattering facts. In *Feiner*, the petitioner (Irving Feiner) was convicted in Syracuse, New York for disorderly conduct pursuant to an "open-air meeting" (or speech), he held at a street corner.<sup>185</sup> The content of his speech included making derogatory remarks towards then-President Truman, the American Legion, the Mayor of Syracuse, and other local politicians.<sup>186</sup> During his speech, he attracted a crowd of about seventy-five to eighty mixed race people who were "filling the sidewalk and spreading out into the street."<sup>187</sup> Upon being notified of the large crowd in Syracuse, local police also observed that Feiner's speech "gave the impression that he was endeavoring to arouse the [Black] people against the whites" and was advocating for the Black citizens of Syracuse to "rise up in arms and fight for equal rights."<sup>188</sup> His speech proved especially polarizing. As Feiner's comments continued, excitement was being stirred up among the crowd and the police feared that a riot or fight was going to ensue.<sup>189</sup> Particularly, angry

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<sup>182</sup> *Feiner v. New York*, 340 U.S. 315, 321 (1951) ("It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that . . . they are powerless to prevent a breach of peace.").

<sup>183</sup> 340 U.S. 315 (1951).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 316.

<sup>186</sup> *Id.* at 317.

<sup>187</sup> *Id.* at 316.

<sup>188</sup> *Id.* at 317.

<sup>189</sup> *Id.*

listeners were seeking to harm *Feiner*.<sup>190</sup> In an attempt to defuse the situation, the local police demanded that *Feiner* step down from his wooden box on the corner and stop speaking.<sup>191</sup> Ultimately, *Feiner* ignored the requests by the police and, when an attack from the crowd became imminent, the police arrested *Feiner* and charged him with disorderly conduct.<sup>192</sup>

In effect, the Heckler's Veto allows law enforcement to balance the interest of an individual's freedom of speech with public safety, and allows officers to suppress the speaker when necessary. Though *Feiner* has never been formally overruled, it is relatively dormant and is heavily criticized by some as an egregious limitation on the freedom of speech.<sup>193</sup> Despite its criticism, this Note argues that it could provide a useful venue when applied to depictions of the Prophet Muhammad.

Though this position is the most extreme of the three solutions presented, in terms of protecting free speech, its application is most suitable for other Islamophobic art events. Particularly, the event at the Curtis Curwell Center of Garland, Texas is very similar to the "street-corner speech" in *Feiner* since both are public forums.<sup>194</sup> Next, a key factor in the *Feiner* decision was the presence of people in the crowd "both for and against the speaker."<sup>195</sup> With regards to the "Draw Muhammad" Art Contest, there are two possible "counter-protestors": (1) the radicalized shooters or (2) the people of Garland, Texas. First, this approach may be flawed if the counter-protestors are the radicalized shooters because the Heckler's Veto serves to "prevent a breach of the peace."<sup>196</sup> Therefore, if the "hecklers" are already breaching the peace, suppressing the speaker after the harm has been done becomes pointless and clearly unconstitutional. How-

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<sup>190</sup> *See id.*

<sup>191</sup> *Id.* at 318.

<sup>192</sup> *Id.*

<sup>193</sup> *E.g.*, CAROL M. ALLEN, ENDING RACIAL PREFERENCES: THE MICHIGAN STORY 57 (2008) (citing Michigan State University professor William B. Allen who referred to the Heckler's Veto as "verbal terrorism.").

<sup>194</sup> *Feiner*, 340 U.S. at 321-22 (Black, J., dissenting).

<sup>195</sup> *Id.* at 317.

<sup>196</sup> *Id.* at 321.

ever, if the government can present evidence of the shooters' imminent attack, they could effectively become "inchoate" hecklers, thus prompting the government to suppress the speaker. Ultimately, this is a much weaker justification and could lead to boundless discretion by law enforcement to suppress speakers for illusory reasons.

Alternatively, the hecklers can be the people of Garland, Texas. Short of recommending the people of Garland to break the law, if a cohort of citizens who reject Geller and her followers' Islamophobic agenda, they could, pursuant to *Feiner*, voice their contrary opinions at the "Draw Muhammad" Contest. However, the suppression aspect of *Feiner* is not invoked until a breach of peace is imminent.<sup>197</sup> So, depending on the volatility of the discourse, the government would only have the opportunity to step in and suppress the Islamophobic speakers once the crowd devolved into lawlessness.

#### V. OPPOSING VIEWS

Contrary to the positions and solutions proposed in this Note, some argue that depictions of the Prophet Muhammad, no matter how provocative, should never be censored or otherwise regulated by the government or private actors. The two prevailing arguments within this opposing view are the marketplace of ideas theory and a less legally-based "cowardice" argument.

##### A. *Marketplace of Ideas*

First, the marketplace of ideas theory, subscribes to the belief that "the more speech, the better" and speech should almost never be regulated.<sup>198</sup> Further, the marketplace of ideas (also known as the "search-for-truth" rationale) holds that in the end "truth" will prevail

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<sup>197</sup> *Id.*

<sup>198</sup> STONE, *supra* note 101 at 9 ("The search-for-truth rationale for the protection of free expression rests on the premise that 'when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . .').

and the listeners will be able to discern it from the falsities without the government needing to regulate anything.<sup>199</sup>

However, this marketplace theory does not apply in instances of hate speech which leads to violence. Particularly, the concern about hate speech is not the truth or falsity of the statements, but rather the effect it will have on the listeners. The effect on the listeners includes marginalizing the targeted group and creating the “us versus them” phenomenon, which pits the non-targeted listeners against the targeted group of the hate speech. As the “us versus them” phenomenon is propagated throughout the national conversation, hate crimes are perpetrated like the ones referenced by Attorney General Lynch.<sup>200</sup> Because of the lack of a factual point, there is no “search-for-truth” in the statement. The central reason why the marketplace of ideas counterargument fails to address hate speech is because the theory relies on a premise of impossible rationality and skepticism exhibited by all listeners, and it further ignores the susceptibility and exploitation of fear. In the case of Islamophobia, examples of terror attacks carried out by radicalized criminals who pervert the religion of Islam persuade people to think that Islam is a “violent religion” that should be feared, while in reality, the vast majority of the 2.2 billion Muslims on Earth are peaceful.<sup>201</sup> This sentiment can be seen when prominent American voices, on both sides of the political spectrum, propagate a false narrative that Muslims should be feared solely because of their religion.<sup>202</sup> Therefore, the

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<sup>199</sup> *Id.*

<sup>200</sup> Gerstein, *supra* note 62.

<sup>201</sup> Hanna Mayj, *2.2 Billion: World's Muslim Population Doubles*, TIME (Jan. 27, 2011), <http://newsfeed.time.com/2011/01/27/2-2-billion-worlds-muslim-population-doubles/>.

<sup>202</sup> To name a few, liberal-leaning comedian and talk show host Bill Maher, Republican presidential candidate and real estate mogul, Donald J. Trump, and Republican presidential candidate and esteemed neurosurgeon, Ben Carson. Sarah Burris, *“It was probably not the Amish”: Bill Maher Urges Liberals to Wake Up About Islam After Paris Attacks*, SALON (Nov. 14, 2015, 8:25 AM), [http://www.salon.com/2015/11/14/it\\_was\\_probably\\_not\\_the\\_amish\\_bill\\_maher\\_urges\\_liberals\\_to\\_wake\\_up\\_about\\_islam\\_after\\_paris\\_attacks/](http://www.salon.com/2015/11/14/it_was_probably_not_the_amish_bill_maher_urges_liberals_to_wake_up_about_islam_after_paris_attacks/); Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban->

marketplace of ideas rationale falls short in providing an adequate defense for Islamophobic speech.

*B. Cowardice*

The second and more popular argument proffered by Pamela Geller is the cowardice argument.<sup>203</sup> This argument, as posted on Geller's blog, *Atlas Shrugs*, argues that by preventing Islamophobic speech, the government is serving the interests of the attackers, submitting to the wishes of the terrorists who threaten the speakers for their offensive messages, and embracing the jihad.<sup>204</sup> In other words, any kind of regulation would be punishing the wrong people. Further, she argues that without her and similar Islamophobic statements, "political correctness" will eventually lead to the "[I]slamization of America" and the institution of Sharia Law in the States.<sup>205</sup>

Ultimately, these arguments are without merit and advocate for a "machismo" exercise of freedom of speech which favors intolerance for one religion and falsely victimizes the majority's religions as under attack. Frankly, this kind of rhetoric and thinking is highly counterproductive to the United States inclusiveness efforts, and does not properly represent the sentiment of the nation. In order for Geller's position to have any merit, it must also be true that the United States is a Judeo-Christian nation and other religions, such as Islam, must be resisted from mainstream acceptance, accommodations, and be resented as "un-American." Unfortunately for Geller,

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immigration/; Eric Bradner, *Ben Carson Again Explains Concerns with a Muslim President*, CNN (Sept. 27, 2015, 2:25 PM), <http://www.cnn.com/2015/09/27/politics/ben-carson-muslim-president-sharia-law/>.

<sup>203</sup> E.g. Pamela Geller, *Coward Cartoonist Garry Trudeau Calls Charlie Hebdo "Hate Speech": "Free Speech...Becomes Its Own Kind of Fanaticism,"* ATLAS SHRUGS (Apr. 11, 2015), <http://pamelageller.com/2015/04/coward-cartoonist-garry-trudeau-calls-charlie-hebdo-hate-speech-free-speech-becomes-its-own-kind-of-fanaticism.html/>.

<sup>204</sup> See generally ATLAS SHRUGS, [www.pamelageller.com](http://www.pamelageller.com). (last visited Mar. 3, 2016).

<sup>205</sup> *Id.*

the Establishment and Free Exercise Clauses of the First Amendment<sup>206</sup> exist to reject this very premise and leave her position on constitutionally-unsupported ground. Further, her position favors hostility and xenophobia over tolerance and acceptance. At the risk of making ideological arguments rather than legal ones, the First Amendment and other prevailing American values do not adhere to paranoia and xenophobia in determining which religions and ethnicities deserve full respect and consideration in the national community under the Constitution.<sup>207</sup> Therefore, the United States' commitment to respecting the Muslim community by choosing to prosecute speakers when they challenge national security interests and incite violence, as the United States would do for any other religion or ethnicity, is consistent with the First Amendment and American values.

## VI. CONCLUSION

The Note argues that depictions of the Prophet Muhammad are unique expressions of speech and should be evaluated differently, given their historical significance and context. The Note opens with a summary of Islamophobia, the controversial depictions of the Prophet Muhammad, and the violent retaliation related to the events. Next, the Note applies traditional First Amendment jurisprudence to examine whether the government has a basis to regulate depictions of the Prophet Muhammad. In response, three solutions are proposed: (1) regulation by the government through limited and designated forums; (2) a modified *Brandenburg v. Ohio*<sup>208</sup> test with a national security consideration; and (3) resurgence of the Heckler's Veto from *Feiner v. New York*.<sup>209</sup> Finally, two prevailing counterarguments regarding the marketplace of ideas and cowardice were addressed.

As shown by the analysis of the *Chaplinsky* categories, depictions of the Prophet Muhammad fail to justify any differential treatment if we examine their content alone. However, the historical sig-

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<sup>206</sup> U.S. CONST. amend. I.

<sup>207</sup> See, e.g., *Truax v. Raich*, 239 U.S. 33 (1915).

<sup>208</sup> 395 U.S. 444 (1969).

<sup>209</sup> 340 U.S. 315 (1951).

nificance as shown by violent responses both internationally and domestically should demand a different analysis. Given the United States' political and military involvement in the Middle East in the past decades, it is imperative for the government to bolster relationships with Muslim-Americans as well as the international Muslim community in order to purge the world of the terrorists who have perverted the religion and commit heinous crimes in its name. By failing to appreciate these relationships, the United States risks playing into the hand of terrorist groups like ISIL who seek to exploit the division between the West and Muslim communities.<sup>210</sup> Finally, instead of succumbing to fear and hatred, the United States should promote safety and tolerance while rejecting the perversion of Islam, both by radicalized militants and Islamophobic organizations like the AFDI. When such speech creates violent tension, the government should take a stand to protect its citizens while respecting the First Amendment to the United States Constitution.

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<sup>210</sup> As these poor relations with the Muslim world are exacerbated, terror groups' recruiting strategy becomes easier and an "us (Muslims) versus them (Western civilization)" fallacy is propagated.